

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 8, 2006

HAROLD OLIVER McGEE v. KEVIN MYERS, WARDEN

**Direct Appeal from the Circuit Court for Wayne County
No. 13,549 Stella L. Hargrove, Judge**

No. M2005-00944-CCA-R3-HC - Filed November 17, 2006

On August 13, 1998, the petitioner, Harold Oliver McGee, pled guilty to four counts of felony possession of cocaine with intent to sell. Subsequently, in 2001, he pled guilty to three additional felony cocaine offenses and one count of possession of a firearm during an offense. Thereafter, the petitioner filed a petition for habeas corpus relief, alleging that because he was on bail at the time the first four cocaine offenses were committed, the trial court erred when it imposed concurrent sentences. Additionally, the petitioner alleges that because the sentences for the four cocaine offenses were illegal, the trial court impermissibly used those convictions to enhance his subsequent cocaine and weapon possession convictions. The habeas corpus court agreed with the petitioner and granted habeas corpus relief on all eight of the forgoing convictions. On appeal, the State asks this court to reverse the habeas corpus court's grant of relief. Upon our review of the record and the parties' briefs, we affirm in part and reverse in part the judgment of the habeas corpus court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed in Part,
Reversed in Part; Case Remanded.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. McLIN, JJ., joined.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and Doug Dicus, Assistant District Attorney General, for the appellant, State of Tennessee.

Robert H. Stovall, Jr., Columbia, Tennessee, for the appellee, Harold Oliver McGee.

OPINION

I. Factual Background

From the record before us, it appears that the petitioner committed three sequential drug possession offenses in 1997, which case numbers are 98-A-711, 98-A-715, and 98-A-716. The petitioner was released on bond after the commission of each offense, only to reoffend. There is no record of the petitioner's bonds ever being revoked. The petitioner committed a fourth drug possession offense in 1998, which case number is 98-B-1250.

On August 13, 1998, the petitioner entered pleas of guilty to the aforementioned four offenses. He received eight-year sentences in case numbers 98-A-711, 98-A-715, and 98-B-1250, and a three-year sentence in case number 98-A-716. According to the plea agreement, the sentences were to run concurrently for a total effective sentence of eight years. The following table summarizes the petitioner's 1998 guilty pleas:

<u>Case Number</u>	<u>Offense</u>	<u>Offense Date</u>	<u>Bond Date</u>	<u>Sentence</u>
98-A-716	possession > .5 g. cocaine to sell	8-21-96	4-23-97	3 years
98-A-715	possession ≤ .5 g. cocaine to sell	7-8-97	7-9-97	8 years
98-A-711	possession ≤ .5 g. cocaine to sell	12-29-97	12-30-97	8 years
98-B-1250	possession ≤ 26 g. cocaine to sell	2-3-98	2-4-98	8 years

After serving a portion of his sentences in confinement, the petitioner was released into a community corrections program. The petitioner violated the conditions of his release and his community corrections was revoked. As a result of new charges, on January 5, 2000, the trial court resentenced the petitioner in case 98-A-711 to ten years. This sentence was to be served concurrently with other drug possession sentences stemming from his 1998 pleas.

On January 11, 2001, the petitioner entered a second set of guilty pleas. The petitioner pled guilty in case number 2000-A-344 to two counts of the sale of 26 grams or more of cocaine, one count of possession of 26 grams or more cocaine with the intent to sell, and one count of felony possession of a firearm during an offense. Pursuant to a plea agreement, the petitioner was sentenced as a Range I standard offender on the possession offenses, receiving a sentence of eight years for the possession of cocaine with the intent to sell and one year for the possession of a firearm. The petitioner was sentenced to twenty years as a Range III persistent offender on each sale of cocaine conviction. The twenty-year sentences were to be served consecutively to each other but concurrently to the possession offenses and any outstanding sentences for a total effective sentence of forty years. The plea agreement further provided that counts 3, 5, 6, 7, and 9 would be dismissed. Additionally, the State agreed not to pursue enhanced sentencing on counts 1, 2, and 4 based upon

the offenses being committed in a school zone. The petitioner's 2001 guilty pleas can be summarized as follows:

<u>Case Number</u>	<u>Offense</u>	<u>Offense Date</u>	<u>Range</u>	<u>Sentence</u>
2000-A-344, count 1	sale ≤ 26 g. cocaine	4-16-99	Range III, persistent	20 years
2000-A-344, count 2	sale ≤ 26 g. cocaine	4-19-99	Range III, persistent	20 years
2000-A-344, count 4	possession ≤ 26 g. cocaine to sell	4-27-99	Range I, standard	8 years
2000-A-344, count 8	possession of firearm	4-27-99	Range I, standard	1 year

_____ Thereafter, the petitioner filed a petition for habeas corpus relief, alleging that because he was on bail at the time the first four cocaine offenses were committed, the trial court erred when it imposed concurrent sentences. Additionally, the petitioner alleged that because the sentences for the four cocaine offenses were illegal, the trial court impermissibly used those convictions to enhance his subsequent cocaine and weapon possession convictions. Counsel was appointed, and an evidentiary hearing was held.

At the conclusion of the hearing, the habeas corpus court determined that the petitioner was entitled to relief in both his 1998 and 2001 cases. The court found that the trial court did not have the authority to impose concurrent sentences for the 1998 convictions. Further, the court found that the petitioner's

original eight (8) year sentence has not expired. He is currently serving forty (40) years concurrently with the eight (8) year sentence, amended to ten (10). Petitioner agreed to a plea bargain of forty (40) years as a persistent offender because of the prior felony convictions. It is clear to the Court that Petitioner is restrained of his liberty as a direct consequence of the August, 1998, convictions.

Accordingly, the habeas corpus court determined that the petitioner "carried his burden of proof that the prior convictions are void and that his liberty is restrained as a direct consequence of the void convictions." On appeal, the State contends that the habeas corpus court erred in granting relief.

II. Analysis

Initially, we note that the determination of whether to grant habeas corpus relief is a question of law. McLaney v. Bell, 59 S.W.3d 90, 92 (Tenn. 2001). As such, we will review the trial court's

findings de novo without a presumption of correctness. Id. Moreover, it is the petitioner's burden to demonstrate, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, § 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. See Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). However, "[s]uch relief is available only when it appears from the face of the judgment or the record of the proceedings that a trial court was without jurisdiction to sentence a defendant or that a defendant's sentence of imprisonment or other restraint has expired." Wyatt, 24 S.W.3d at 322; see also Tenn. Code Ann. § 29-21-101 (2000). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. Taylor, 995 S.W.2d at 83. "A void judgment 'is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.' We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal." Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000) (citations omitted). As a prerequisite to habeas corpus relief, a petitioner "must be 'imprisoned or restrained of liberty' by the challenged convictions." Benson v. State, 153 S.W.3d 27, 31 (Tenn. 2004) (citing Tenn. Code Ann. § 29-21-101 (2000)).

The habeas corpus court granted the petitioner relief on two separate bases. First, the court determined that the concurrent sentences imposed as a result of his 1998 guilty pleas were in contravention of a statute mandating consecutive sentences; thus, his plea-bargained sentences and convictions were void. Second, the court determined that because the 1998 convictions were the underlying cause of the petitioner pleading guilty in 2001 and being sentenced as a persistent offender in 2001, those sentences were likewise void. We will address each of these issues in turn.

We note that the petitioner's three-year sentence in case number 98-A-716 expired prior to the filing of his habeas corpus petition. Accordingly, because the petitioner is no longer "imprisoned or restrained of liberty" by that conviction, he is not entitled to habeas corpus relief in case number 98-A-716.

With regard to the remainder of the petitioner's convictions from his 1998 guilty pleas, we agree with the habeas corpus court. The record reflects that the petitioner was on bond at the time he committed the offenses in case numbers 98-A-711, 98-A-715, and 98-B-1250. Therefore, the trial court had no authority to impose concurrent sentences in those cases. See Tenn. Code Ann. § 40-20-111(b) (2003) (stating that when "a defendant commits a felony while . . . released on bail . . . and the defendant is convicted of both such offenses, the trial judge shall not have discretion as to whether the sentences shall run concurrently or cumulatively, but shall order that such sentences be served cumulatively"). The sentences imposed are in direct contravention of a statute, rendering the sentences void.

_____The void sentences in the 1998 cases were imposed pursuant to a plea agreement. Our supreme court has stated that "[a] general rule has developed in the law that where a concurrent sentence will not be imposed as promised, or the sentence bargained for is otherwise illegal, the

defendant is entitled to withdraw the plea.” McLaney, 59 S.W.3d at 95. Thus, we must remand to the convicting court for either an agreed resentencing under the 1989 Sentencing Act or a withdrawal of the petitioner’s guilty pleas. See id. at 94-95; McConnell v. State, 12 S.W.3d 795, 800 (Tenn. 2000).

Next, we turn to the impact of the grant of habeas corpus relief in the 1998 cases on the sentences imposed in connection with the 2001 pleas. The habeas corpus court granted the petitioner relief on the 2001 cases, finding that “Petitioner agreed to a plea bargain of forty (40) years as a persistent offender because of the prior felony convictions. It is clear to the Court that Petitioner is restrained of his liberty as a direct consequence of the August, 1998, convictions.”

____ On appeal, the State argues that the habeas corpus court erred in granting relief in the 2001 cases because “[n]othing on the face of his judgments which resulted in his forty-year sentence is void.” We agree. As the habeas corpus court noted, the petitioner “agreed to a plea bargain” in which he received a forty-year sentence. The petitioner testified at the evidentiary hearing that he agreed to the sentence because he believed his 2001 sentences could be enhanced with the 1998 convictions. In other words, the petitioner essentially argues that because he based his decision to plead on faulty information, his pleas were involuntary. Such an argument, relying as it does upon information outside of the face of the record, would render a sentence voidable, not void. See Stanley Adams v. David Mills, Warden, No. W2004-00758-CCA-R3-HC, 2005 WL 525263, at *2 (Tenn. Crim. App. at Jackson, Mar. 4, 2005), perm. to appeal denied, (Tenn. 2005). The proper avenue for attacking a voidable judgment is through a post-conviction action. However, the statute of limitations to file a post-conviction action on the 2001 cases has expired. This court has previously stated that offender classifications “are non-jurisdictional and legitimate bargaining tools in plea negotiations under the Criminal Sentencing Reform Act of 1989.” Bland v. Dukes, 97 S.W.3d 133, 134 (Tenn. Crim. App. 2002). The habeas corpus court erred in granting relief in the 2001 cases.

III. Conclusion

In conclusion, we affirm the habeas corpus court’s grant of relief in case numbers 98-A-711, 98-A-715, and 98-B-1250. However, we reverse the grant of relief in case number 98-A-716 and in the cases resulting from his 2001 pleas. Accordingly, the cases are remanded for further proceedings consistent with the directives of McLaney v. Bell, 59 S.W.3d 90 (Tenn. 2001), i.e., either an agreed resentencing under the 1989 Sentencing Act or a withdrawal of the petitioner’s 1998 guilty pleas followed by trial.

NORMA McGEE OGLE, JUDGE